United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7219

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7219

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

—against—

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF

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Statement of Issues Presented

1. Whether the New York City Transit Authority, a state-created public benefit corporation, is a "person" within the meaning of 42 U.S.C. § 1983 where its Chairman, Board and Chief of Police are made defendants in their official capacities pursuant to Rule 25 (d)(2) of the Federal Rules of Civil Procedure?

2. Whether the jurisdictional requirement of 28 U.S.C. § 1331 as to the amount in controversy is met by allegations that plaintiffs are prohibited from selling periodicals in person throughout the New York City subway system?

3. Whether the Authority's regulation with regard to the sales of publications throughout the subway system, including petitioners' newspapers which are sold for a profit, are reasonable in light of the particular requirements of the subway's operations?

4. Whether the district court, on the basis of the record before it, properly exercised its discretion by refusing to grant plaintiffs' motion for a preliminary injunction?

Statement of the Case

Plaintiffs, asserting rights under the First Amendment and 42 U.S.C. § 1983, seek to engage in the personal selling of periodicals, for a profit, throughout the New York City subway system. A New York City Transit Authority regulation, and the New York Penal Law, prohibit the solicitation and sale of any items on the transit facilities in this manner. The Authority's premises include a number of newsstands, leased to Ancorp National Services, Inc., which are available for the sale of periodicals of all types.

Statute and Regulation Involved

New York Penal Law § 240.35(7) provides in pertinent part:

"240.35 Loitering

A person is guilty of loitering when he:

* * * * *

(7) Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose

of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services . . . ."

22 New York Codes, Rules and Regulations §1051 provides in pertinent part:

"1051.9 Photographs, peddling, etc. (a) No person shall in any transit facility or upon any part of the New York City transit system, exhibit, sell, or offer for sale, hire or lease or let out any object or merchandise, or anything whatsoever, whether corporeal or incorporeal."

Facts

Plaintiffs allege that they were prevented from selling their newspapers during December, 1974 by unidentified transit patrolmen at the Franklin Avenue IRT Station in Brooklyn and at the 110th Street IRT Station in Manhattan (App. pp. 13a, 16a).

The "Militant" newspaper is purchased from the publisher by plaintiffs for 17¢ a copy, and the "Young Socialist" for 12½¢ a copy, and these are then sold for a profit by plaintiffs at 25¢ a copy (App. p. 12a). It is further stated by plaintiffs that they sell 10 to 40 papers a week on the streets and other public places (App. pp. 11a, 14a).

Plaintiffs desire to sell their papers, and speak to those who gather in the confined areas of the subway stations, for several reasons, among them the large concentration of people in the subways (App. pp. 13a, 15a) and protec-

tion from inclement weather while they sell (App. pp. 12a, 15a).

Plaintiffs are challenging the Transit Authority regulation, 22 NYCRR, §1051, which does not permit any solicitation or sales, such as plaintiffs' throughout the subway system. Such sales are also prohibited by § 240.35 (7) of the New York Penal Law. These regulations, however, do not result in a total ban on the sale and distribution of publications because the Authority has established a channel for the distribution of all newspapers, magazines and periodicals, consistent with the safety and efficiency needs of the subway, through the newsstands. The rights to these newsstands are leased by the Authority in an exclusive contract to Ancorp National Services, Inc. which operates certain stands and subleases others. Such leasing provides the Authority with a much needed source of revenue (App. p. 25a). These newsstands are willing to accept publications for sale regardless of their political content (App. p. 27a).

The court below held that it lacked subject matter jurisdiction of plaintiffs' cause of action and that the plaintiffs failed to make a sufficient showing to require that defendants be preliminarily enjoined from enforcing the aforementioned regulation and statute.

Plaintiffs moved this Court for the issuance of an injunction pending the hearing of this appeal. This motion was denied, in open Court, on April 22, 1975.

POINT I

The District Court lacked subject matter jurisdiction under both 28 U.S.C. §§1331 and 1343(4) as the amount in controversy does not exceed $10,000 and the New York City Transit Authority is not a "person" within the meaning of 42 U.S.C. §1983.

The plaintiffs set forth two theories of jurisdiction in their complaint. The first is that the case arises under the First and Fourteenth Amendments and that the amount in controversy exceeds $10,000 exclusive of interests and costs. The second is that this case arises under 42 U.S.C. §1983, which creates a cause of action for deprivation of rights against "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," subjects a citizen or other person to the deprivation of any rights secured by the Constitution and laws of the United States and that 28 U.S.C. §1343(4) confers jurisdiction upon the District Court for causes of action arising under 42 U.S.C. §1983.

Neither plaintiffs' complaint, nor the affidavits submitted in support of the motion before the District Court contain any more than the mere allegation that the amount in controversy exceeds $10,000, as required by 28 U.S.C. §1331. There is not the slightest showing that the alleged refusal of the defendants to allow the sale of certain periodicals in the manner proposed by plaintiffs will damage them in excess of $10,000. The mere assertion that one's constitutional rights are being violated does not satisfy the $10,000 requirement of §1331. *Giancana* v. *Johnson,* 335 F. 2d 366 (7th Cir., 1964), cert. denied 379 U.S. 1001 (1965), *Boyd* v. *Clark,* 287 F. Supp. 561 (S.D.N.Y. 1968) aff'd on other

grounds 393 U.S. 316 (1969). In *Goldsmith* v. *Sutherland,* 426 F. 2d 1395 (6th Cir., 1970), the court held that the allegation in a complaint that the plaintiff was being unconstitutionally barred from distributing leaflets and that this damaged him in excess of $10,000 did not satisfy the jurisdictional amount requirement of §1331.

Nor could the District Court take jurisdiction of plaintiffs' alleged cause of action under 28 U.S.C. §1343(4) because the New York City Transit Authority is not a "person" within the meaning of 42 U.S.C. §1983. The plaintiffs have sought to circumvent the plain intention of §1983 by making certain individuals defendants, viz., the Chief of Transit Police and Chairman and Members of the Board of the New York City Transit Authority. It is the action or policy of the Transit Authority, a corporate body, which is challenged in plaintiffs' complaint. There is no allegation in either the complaint or in the affidavits of Ms. Wright or Mr. Lieberman that the police officers whom they refer to were acting at the direction of either the Chief of the Transit Police or the Board of the Authority or that the Chief of Police, Chairman or Members of the Board have taken any action in their official capacities or otherwise, with respect to the plaintiffs.

The Transit Authority is not a "person" within the meaning of §1983. The Supreme Court has recently held that municipal corporations are not "persons" for purposes of §1983 and injunctive relief against a municipality will not be granted under that statute. *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973).

The Supreme Court has considered the issue of liability of public agencies under §1983 several times. In *Monroe* v. *Pape,* 365 U.S. 167 (1961), the court examined the history

and purpose of civil rights statutes in detail. Based on that history, the court held (365 U.S. at 187), that Congress did not undertake to bring municipal corporations within the ambit of §1979 (now 42 U.S.C. §1983). The Court more explicitly held in *City of Kenosha* v. *Bruno, supra,* that injunctive relief does not lie against a municipal corporation under §1983.

In *Sams* v. *New York State Board of Parole, et al.,* 352 F. Supp. 296 (S.D.N.Y. 1972, appeal dismissed 2d Cir., 12-11-73) the court held that the Transit Authority is not a person under §1983:

> "It is well settled since *Monroe* v. *Pape* that a municipal corporation is not a 'person' within the purview of either section 1983 or section 1985. The logical extension of the doctrine makes it applicable to the State and governmental agencies, such as a state department of social services, state boards of parole, state courts, a city-owned hospital, city police departments, a city rent and rehabilitation administration, and school districts. This defendant City Transit Authority also has been held immune from suit under the *Monroe* v. *Pape* doctrine.
>
> "Since the City Transit Authority, state-created, is a public benefit corporation and performs a governmental function, the court holds that it is not a 'person' within the ambit of section 1983, and accordingly the claim against it for money damages under that section is dismissed for lack of subject matter jurisdiction."

Merely because the plaintiffs have made the Chairman and Members of the Board of the Transit Authority defendants in this action does not render them liable under §1983.

In *Bennett* v. *Gravelle,* 323 F. Supp. 203, 211 (D.C. Maryland, 1971), aff'd 451 F. 2d 1011 (1971) cert. dis. 407 U.S. 917 (1972), the court, in dismissing a complaint in a civil rights action brought individually and in their official capacities, against the Chairman and other members of the Washington Sanitary Commission for alleged racial discrimination said:

> "In their official capacities, the Commissioners are extensions of the municipal agency and are, therefore, not 'persons' within the meaning of section 1983. Accordingly, damages may not be assessed against the defendants under this section for acting in their official capacities."

Similar conclusions were reached in *Worley* v. *California Department of Corrections,* 432 F. 2d 769 (9th Cir., 1970) and *Silver* v. *Dickson,* 403 F. 2d 642 (9th Cir., 1968) cert. den. 394 U.S. 990 (1969) involving state parole board members.

The New York City Transit Authority is a public benefit corporation created pursuant to the provisions of New York Public Authorities Law §1201 *et seq.* It is, no less than a municipal corporation, a creature of the state and not a "person" for purposes of 42 U.S.C. §1983. There is no basis, in law or logic, for differentiating between a municipal corporation and a public benefit corporation in determining whether either is a "person" for purposes of §1983. To the extent that this Court's decision in *Forman* v. *Community Services, Inc.,* 500 F. 2d 1246 (2d Cir., 1974), rev'd on other grounds, *sub nom. United Housing Foundation, Inc.* v. *Forman,* 43 U.S.L.W. 4742 (1975), does so differentiate, it is inconsistent with the Supreme Court's holding in *City of Kenosha* v. *Bruno, supra*:

> "In considering the reach of §1983, in *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court examined the legislative history surrounding its enactment and said: 'The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.' *Id.*, at 191" 412 U.S. at 512.

Just as municipal corporations are not "persons" in damage actions under §1983, neither may they be the subject of equitable relief under the statute:

> "We find nothing in the legislative history discussed in *Monroe*, or in the language actually used by Congress, to suggest that the generic word 'person' in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe*, 'Congress did not undertake to bring municipal corporations within the ambit of' § 1983, *id.*, at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343." 412 U.S. at 513.

In the cases cited by this Court in *Forman* v. *Community Services, Inc., supra, Escalera* v. *New York City Housing Authority*, 425 F. 2d 853 (2d Cir., 1970), cert. denied 400 U.S. 853 (1971), *Holman* v. *New York City Housing Authority*, 398 F. 2d 262 (2d Cir. 1968), it does not appear that the Housing Authority raised the defense that it was not a

"person" for § 1983 purposes and this Court did not consider it.

While § 25(d)(2) of the Federal Rules of Civil Procedure allows suit against a public official by his official title, it does not create any substantive rights. If the named defendants were the proper parties, they could be so described; however, there was no showing in the court below that the actions of the named officials were the cause of plaintiffs' complaint. Moreover, the mere naming of the defendants in the title of this action does not create jurisdiction, especially where no service has been made or even attempted upon them individually. Fed. R. Civ. P. 4; *Surowitz* v. *New York City Employees' Retirement System,* 376 F. Supp. 369 (S.D.N.Y., 1974).

POINT II

First Amendment rights may not be exercised in an inappropriate place but may be regulated as to the time, place and manner of their exercise.

What constitutes an appropriate place for the exercise of First Amendment rights is determined largely by the facts in the individual case. The various tests that have been developed by the courts to guide these factual determinations, focus, essentially, on the nature and use of the place and on whether the First Amendment activities in question would interfere with this use. See, e.g., *Lloyd* v. *Tanner,* 407 U.S. 551 (1972); *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *Adderly* v. *Florida,* 385 U.S. 39 (1966); *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2nd Cir., 1968), cert. denied 393 U.S. 940 (1968).

Underlying this case by case approach is a recognition that a First Amendment right is ". . . not absolute, but

relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." (*Hague* v. *CIO*, 307 U.S. 496, 516 [1939].)

Thus, although the content of the demonstrators' speech near the jailhouse in *Adderly* v. *Florida, supra,* may have been protected, the Court rejected the assertion that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." 385 U.S. 39, 48 (1966).

Moreover, even where a protected First Amendment right is found to exist, and a place is deemed an appropriate forum for its exercise, regulations may guide the "time, place, duration or manner of use" of the forum. *Cox* v. *Louisiana,* 379 U.S. 536 (1965).[1]

The test as to whether a regulation is reasonable depends on the "nature of a place" and "the pattern of its normal activity," *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), as well as the governmental interest involved, which should be "unrelated to the suppression of free expression." *U.S.* v. *O'Brien,* 391 U.S. 367, 377 (1968).

Plaintiffs in the instant case acknowledge that the Transit Authority can regulate the time, place and manner of the sale of their newspapers, and no claim is made that the Transit Authority regulations discriminate against

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[1] Cf., *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Adderly* v. *Florida,* 385 U.S. 39 (1966); *Brown* v. *Louisiana,* 383 U.S. 131 (1966); *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U.S. 308 (1968); *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2nd Cir., 1968), cert. denied, 393 U.S. 940 (1968).

them because of the content of their papers. The regulation in question is aimed at all peddling of any newspaper, magazine or other article, and regulates the sale, not the content. Plaintiffs' proposed method of sale is also proscribed by N.Y. Penal Law §240.35(7), formerly §1990-a, added in 1939. As will be discussed *infra,* the regulation is reasonable in light of the nature and primary use of the subway system which make it singularly inappropriate for unrestricted peddling and selling.

POINT III

The Transit Authority's regulations with regard to the time, place and manner of sale and distribution of newspapers is reasonable, and does not violate plaintiffs' asserted First Amendment rights.

A. The Transit Authority has provided a channel for the distribution of protected First Amendment material in a manner consistent with the particular requirements of the subway's operations.

(1)

Plaintiffs may be correct in asserting that their right to speak to people and proselytize enjoys the protection of the First Amendment guarantee of freedom of speech, and that the sale and distribution of newspapers is entitled to certain freedom of the press guarantees. The exercise of these rights may, however, be reasonably regulated as to time, place and manner, which plaintiffs acknowledge, and the Transit Authority does so regulate the distribution and sale of newspapers. This regulation, however, does not result in a total ban on the distribution of the literature. Rather, a channel has been established by the Authority for the sale of all newspapers,

magazines and periodicals through the newsstands, which are the appropriate means in light of the singular "nature" and "primary use" of the subways and the pattern of its normal activities.

The Port Authority's important governmental interest was recognized by this Court in *Wolin* v. *Port of New York Authority,* 392 F. 2d 83 (2nd Cir., 1968), cert. denied 393 U.S. 940 (1968), as applied to the bus terminal:

> "No one can question the legitimate public interest in maintaining a free flow of traffic in the terminal, in avoiding excessive disruption of normal activities there, in insuring the convenience and movement of passengers and vehicles." *Id.* at 93.

The governmental interest is even stronger in the case of the Transit Authority, where trains are in operation 24 hours a day at over 416 stations, with arrival and departure times only several minutes apart. The stations are often narrow and usually crowded, often at variable times, especially at stations such as 34th and 42nd Streets, where passengers come from the railroads or Madison Square Garden and the theaters. (These distinctive characteristics of the subway are discussed more fully, *infra,* under subheading B, at 16.) It would be virtually impossible to regulate individual sales of literature or merchandise by plaintiffs and countless other groups whose aim is not only to sell but to speak to buyers and to "catch the interest of non-readers who pause to listen" [2] at the numerous subway stations, except by sales at authorized news-

[2] Brief of Plaintiffs-Appellants at 23.

stands or concessions, which are placed in a central location in appropriate stations.

The Authority, through newsstands, has provided a channel for the distribution of protected First Amendment material in a manner that is consistent with the particular requirements of subway operations, and plaintiffs may freely avail themselves of this channel.[3]

Plaintiffs further assert, however, a right to sell their newspapers in person throughout the subway system based on this court's holding in *Wolin*.[4] In *Wolin*, however, the Port Authority refused to allow any protest communication by the plaintiffs involved and it was held that each of the methods of communication in question—handbilling, the use of placards, and the use of literature display tables—was protected. However, it was not necessary to decide in that case, as plaintiffs here suggest, whether these independent activities were deemed to constitute one protected method of communication. There is no principle which requires that plaintiffs be allowed to engage in the conduct of selling at the same time that they speak to people and proselytize, although plaintiffs rely on an unwarranted extension of the holding in *Wolin*.

The Authority does not make any attempt to curtail plaintiffs' verbal interchanges; the content of plaintiffs' papers are in no way censored, nor does a total ban exist, as it did in *Wolin*. However, the Authority may regulate

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[3] A letter from Ancorp is annexed to the affidavit of John G. de[illegible]s, Appendix at 27a.

[4] Plaintiffs also quote language from the Court's dicta in *Thomas* v. *Collins*, 323 U.S. 516 (1945). The holding there, however, dealt with the application of First Amendment safeguards of speech and assembly in the economic sphere, as well as in the religious sphere.

the time, place, and manner of sale and distribution of the newspaper, one of the methods of communication chosen by plaintiffs.

(2)

In addition, even if these activities were considered features of a single method of communication, as plaintiffs assert, the Authority would find support for its restriction of newspaper sales to the newsstands in its ability to regulate the commercial aspect, the selling for a profit, of those publications. Faced with the question of door to door canvassing to distribute periodicals the Court said:

> "This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publication from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature." (*Breard* v. *Alexandria,* 341 U.S. 622, 641-42 [1951]).

and held that the selling, the commercial feature, could be independently regulated. The Court distinguished an earlier case[5] which allowed door to door canvassing to disseminate free religious literature because no element of the commercial had entered that case. Cf., *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942).

In *Smith* v. *California,* 361 U.S. 147 (1959), and *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), cited by plaintiffs, the Court reaffirmed the principle that a publication does not necessarily lose its First Amendment pro-

[5] *Martin* v. *City of Struthers,* 319 U.S. 141 (1943).

tection merely because it is offered for sale. These cases are not inconsistent with *Breard, supra,* however, because the primary concern in those cases was with an ordinance and a libel suit aimed at the *content* of the publication, rather than with a governmental interest unrelated to the suppression of free expression. In the instant case no such suppression of content is desired.

Finally, it should be noted that *Breard* was cited by the Court in a recent decision which upheld a municipal policy not to permit political advertising on its transit vehicles. *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974).

The principle established in *Breard* remains a sound one, therefore, and applies to the instant case. The Authority does not ban plaintiffs' discussion with other individuals nor the sale of newspapers, but regulates only their attempt to sell these papers in person throughout the subways, independently of the newsstands which they may utilize.

B. *The subway system is generally an inappropriate place for plaintiffs' proposed method of sale and distribution of its newspapers.*

In seeking to display their papers and offer them for sale in person to subway passengers, apart from the newsstands, plaintiffs rely heavily on *Wolin* v. *Port of New York Authority, supra.* They are correct in concluding, based on *Wolin,* that the fact that stations are indoors or underground does not make them inappropriate for the distribution of papers. A comparison of the facts in that case with those in the present one, however, reveals significant differences which distinguish the instant case and

establishes that the subways, like the shopping mall in *Lloyd*,[6] the buses in *Lehman, supra,* and the jailhouse grounds in *Adderly, supra,* are inappropriate places for this exercise of asserted First Amendment rights.[7]

The bus terminal in *Wolin* was described as "something of a small city . . . not unlike some futuristic design for urban living." *Id.* at 89. In fact, the concourse areas were found to be "more appropriate for the proposed activity than a narrow sidewalk." *Id.* at 91. The bus terminal serves as a waiting room where people can come to meet someone or see them off, or just to shop at the various concessions—just to buy "food" or drink or magazines and newspapers."[8]

In contrast, the subways, the first of which was built in 1903, would hardly be described as a "futuristic design for urban living." There are over 416 stations, usually with narrow platforms, within the subway system, as opposed to the individual bus, airline and railroad terminals which were discussed in the cases cited by plaintiffs. Unlike the terminals, which are free and open to the public, passengers pay to enter and use the subways. These subway areas, where people are going to and from trains, often rushing, are even less desirable than a narrow sidewalk. Approximately four million people are carried daily; few,

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[6] *Lloyd* v. *Tanner,* 407 U.S. 551 (1972).

[7] Plaintiffs also cite *Chicago Area Military Project* v. *City of Chicago,* 508 F. 2d 921 (7th Cir., 1975); *Kuszynski* v. *City of Oakland,* 479 F. 2d 1130 (9th Cir., 1973) (airport terminal) and *In re Hoffman,* 64 Cal. Rptr. 97, 434 P. 2d 353, 67 Cal. 2d 845 (1967) (railroad station). These will be grouped with *Wolin* for purposes of comparison.

[8] *In re Hoffman,* 434 P. 2d 353, 354 (1967).

if any, people pay to use the subways just to meet someone or see them off or just to buy food or drink. In fact, most subway stations have no concessions. The subway stations do not have the features of a waiting room which a single, centrally located railroad, airline or bus terminal does.

A single terminal in one location may be regulated as to the times and places where a person may distribute leaflets. However, it would be close to impossible to so regulate the sprawling subway system, usually crowded, often unexpectedly, with its individual stations and staggered train schedules, running 24 hours a day, in order to accommodate plaintiffs, as well as others who would then also be free to use the subways as a market for the in-person peddling of their literature.

Another significant distinction is that the restriction on plaintiffs' activity here is not a result of the content of their publication nor is it the result of a broad regulation against disorderly conduct, as was the case in *Wolin*. Rather, the restriction is on sales within the subway system in order to prevent interference with the primary use of the subways—the attempt to provide safe and efficient transportation -which will result if individuals or groups can use the subways to approach passengers to peddle and sell newspapers and other publications, and to attract passers-by who "pause to listen" as plaintiffs desire.

Thus, all these features combine to make the subways an inappropriate place for the unrestricted, in-person sale of newspapers, independently of the newsstands which are provided.

(2)

There is another relevant consideration which supports the Transit Authority's position. An extension of the decision in *Wolin* to a significantly different factual situation is unwarranted in light of two recent Supreme Court cases decided after *Wolin*, viz. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) and *Lloyd* v. *Tanner*, 407 U.S. 551 (1972).

The Supreme Court, in *Lehman* v. *City of Shaker Heights, supra,* held that the policy of the City requiring its advertising contractor to refuse to accept all political advertising on publicly owned transit facilities did not deny a candidate for office his First Amendment rights. In so deciding the Court established that the "Nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question." *Id.* at pp. 302-3. This court decided that the same factors are put into this balance whether it be a "street, park, shopping center, bus terminal, or office plaza." *Wolin, supra,* p. 88.

The Supreme Court has had occasion recently to consider some of these factors in *Lloyd* v. *Tanner, supra.*[9] The Court of Appeals in that case, which involved a privately owned shopping center, found the mall to be the "functional equivalent of a public business district," citing *Wolin* (*Lloyd, supra,* p. 556). Relying on *Marsh* v. *Alabama,*[10] *Logan Val-*

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[9] The Court in *Lloyd* dealt with these factors in deciding whether the privately owned shopping center had become open to the public to a degree that made it an appropriate forum for handbilling. However, these factors and the Court's discussion are relevant in the instant case on the issue of whether the subways, although open to the public for a particular purpose, transportation, are appropriate for plaintiffs' proposed activities.

[10] 326 U.S. 501 (1946).

ley[11] and *Wolin,* the court found for the plaintiffs and held that the defendants' recourse was arrest and prosecution of plaintiffs in the normal course. The Supreme Court reversed, however, suggesting that the lower courts' reliance on these cases had been misplaced. The mall was a large, modern indoor shopping complex, with parking, sidewalks, gardens, an auditorium and even a skating rink. However, the Court did not rely on whether there was the equivalent of a "public business district" as the Court of Appeals had, but rather it considered whether the handbilling was related to the operations of the mall and whether alternative means existed for plaintiffs to convey their message. The Court distinguished *Logan Valley* because there no other reasonable opportunities for the pickets to convey their message to their intended audience were available. *Lloyd, supra,* at 563. In *Lloyd,* the Court found that the handbill, which had no relation to any purpose for which the center was built and being used, could be distributed on the public sidewalks and streets.

Thus, the Court concluded, even though property is open to the public, it is not necessarily open "for any and all purposes," *Lloyd* v. *Tanner, supra,* at 565, and even publicly owned property is not necessarily "available for speech, pickets, or other communicative activities." *Id.* at 568.

The subways then, though open to the public for transportation, are not the equivalent of a "public business district" nor should that be the test. They are not open to the unrestricted sale and distribution of literature that is unrelated to the purpose and uses of the subway, especially when adequate alternative means exist for reaching the same "working class" audience—through the newsstands, for example, or on the public sidewalks near the subway station.

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[11] 391 U.S. 308 (1968).

One additional aspect should be noted. Any solicitation and sale in the subway cars themselves may be restricted for both safety and commercial reasons. The controlling case is *Lehman* v. *City of Shaker Heights, supra,* which dealt with rights of passengers, who are captive audiences in buses. Additionally, with the subway trains, unlike buses, there is the added danger of people walking through the cars as they sell their literature. Therefore, the Authority clearly has a right, in light of these valid considerations, to prevent all such sales of literature in the subway cars.[12]

In summary, then, the subway has as its primary use the transportation of people and the Authority may properly restrict newspaper sales, at other than the newsstands, throughout the subways. The interest of the Authority in providing safe, efficient transportation to people—who pay for admittance to the subways and for such service—is inconsistent with allowing unrestricted sales or peddling unrelated to this primary use. The subways are inappropriate places for plaintiffs' proposed method of distribution.

Although plaintiffs agree that the Transit Authority can regulate the distribution of their newspapers, they are asking this Court to carve out an exception to the distribution method which has been developed. They ask the court to declare invalid the regulations under which every other publication, admittedly protected by the First Amendment, is dispensed, and they propose instead a method which

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[12] The holding in *Lehman* casts doubt on the decision in *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S.D.N.Y. 1967), cited by plaintiffs. In any event, in *Kissinger,* the court did not reach the issue of whether the subway was an appropriate First Amendment forum in all cases. It based the decision on the ground that when certain ads are accepted, others cannot be refused because of their anti-war message unless there exists a serious threat to safety and efficiency.

could cause significant disruption to the system's already strained order and jeopardize the safety of other passengers.

POINT IV

The Authority has a valid proprietary interest in any sales that are permitted within the subway system, as long as there is no substantial infringement of First Amendment rights. The action of the Authority in the instant case creates no such infringement.

In addition to the Authority's governmental interest in these newspaper sales in order to maintain the safety and efficiency of the subways, there exists a valid proprietary interest.[13] The Authority is engaged in commerce in much the same way as was the City in *Lehman* v. *City of Shaker Heights, supra.* It "must provide rapid, convenient, pleasant and inexpensive service to the commuters. . . ." *Id.* at 303. The newsstands operated in the subways provide a source of much needed revenue, which, in addition to the fares collected from passengers, is used to meet the Authority's expenses. This source of revenue can be destroyed if plaintiffs, and hence all those who presently sell through the newsstands, are allowed to peddle their papers independently through the subway stations.

In *Grosjean* v. *American Press Co.*,[14] where a license tax was imposed on newspapers and magazines with a circulation of over 20,000 copies, a test was proposed which serves as a useful guide. The Court considered whether

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[13] See N.Y. Public Authorities Law §1204(13).

[14] 297 U.S. 233 (1936).

the tax was "singled out in kind," and whether it imposed a "serious burden" on free expression, and whether the tax was a "pretense." Two later cases, *Murdock* v. *Pennsylvania*[15] and *Follett* v. *McCormick*,[16] developed a fourth criterion, whether the tax was imposed directly on the exercise of the right.[17]

The instant case meets these tests. Everyone is prohibited from selling within the subways except as permitted through the contract with the Transit Authority. Newspapers are not singled out here as they were in *Murdock;* rather, any publication, confectionery, or other article is so regulated. The regulation is clearly not a pretense since it applies uniformly. Indeed, it is economically profitable for the Authority to allow sales through the channels that are established.

Finally, the fact that no serious burden is imposed on First Amendment activities is tied in with the question of whether there is any direct tax on the exercise of the right itself.

There is no license tax in this case at all, "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues" which results in a prior restraint. *Murdock* v. *Pennsylvania, supra* at 113. The income the Authority realizes is related through a percentage system, to the amount of sales. As the Court in *Murdock, supra,* recognized, the press and religious groups are not "free from all financial burdens of gov-

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[15] 319 U.S. 105 (1943).

[16] 321 U.S. 573 (1944).

[17] See also T. Emerson, "The System of Freedom of Expression", pp. 418, ff. (1970).

ernment." *Id.* at 112.[18] Therefore, the raising of revenue based on the sales or income from publications sold in the subways does not run afoul of any constitutional protections afforded plaintiffs. Moreover, a vehicle is provided plaintiffs for the sale of their papers. Indeed, in the case of Mr. Lieberman, who has so little time to devote to these sales,[19] the newsstands could afford even greater exposure for the publications involved.

It follows, therefore, that the Authority may require plaintiffs, if they desire to sell their publications, to do so through the established newsstands, without infringing on petitioners' asserted First Amendment rights.

POINT V

Plaintiffs, having failed to demonstrate either irreparable damage or hardship, are not entitled to a preliminary injunction.

It is basic that the party seeking the extraordinary and drastic relief which a preliminary injunction constitutes must sustain, by a clear showing, the burden of persuasion, or the relief should not be granted. 11 Wright, Federal Practice and Procedure §2948. As was more fully demonstrated in Points II, III and IV, plaintiffs have established no constitutional right to peddle newspapers throughout the New York City Transit System. Under this heading, it will be shown that the plaintiffs do not allege either irreparable harm or even hardship sufficient to justify the issuance of a preliminary injunction.

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[18] Cf. *City of Corona* v. *Corona Daily Independent,* 252 P. 2d 56 (1953), cert. denied 346 U.S. 833 (1953).

[19] See *Lieberman affidavit,* submitted by plaintiffs.

In Point III of their brief, plaintiffs make the blanket assertion that "A prohibition upon expression, without more gives rise to irreparable injury which is cognizable in equity . . ." There is no such principle that the mere allegation of the deprivation of First Amendment rights constitutes irreparable injury. An analysis of various cases, including those cited by plaintiffs, will demonstrate that federal courts have refused to issue preliminary injunctions solely on the basis of a naked allegation that constitutional rights were being violated. Even where a more credible case alleging violation of constitutional rights has been made, federal courts have still declined to issue preliminary injunctions on that basis alone.

In *Wulp* v. *Corcoran,* 454 F. 2d 826 (1st Cir., 1972), the First Circuit sustained the district court's refusal to grant injunctive relief to halt the enforcement of what the court characterized as a "facially unconstitutional" ordinance which required members of the Socialist Workers Party to acquire a permit and badge before peddling newspapers. Plaintiffs in the instant case do not even allege that the regulation in question is unconstitutional on its face. The denial of an injunction in the circumstances of *Wulp* clearly illustrates that its issuance cannot be proper here.

In *Hull* v. *Petrillo,* 439 F. 2d 1184 (2nd Cir., 1971), this Court similarly affirmed the denial of a preliminary injunction in the face of allegations by sellers of a Black Panther Party newspaper that an invalid ordinance required them to pay a license fee and that they were victims of a campaign of police harassment. Here, plaintiffs cannot be entitled to a preliminary injunction when the defendant is willing, as discussed *supra,* to permit the sale of plaintiffs' newspapers on the same basis as all other newspapers are

sold throughout the transit system, i.e., from newsstands and where there is no allegation of any bad faith campaign of harassment against these particular plaintiffs.

The mere allegation that First Amendment rights are being abridged does not entitle plaintiffs to the relief they seek. Questions relative to the characteristics and safety considerations involved in the operation of the subway system, more fully discussed *supra,* are raised by plaintiffs' allegations. Even where constitutional claims are raised, especially where the preliminary relief sought by plaintiffs is inextricably bound up with the permanent relief sought, a preliminary injunction should not issue. *Brass* v. *Hoberman,* 295 F. Supp. 358, 365 (S.D.N.Y., 1968).

Even the allegation that the location proposed for the erection of public schools would result in segregation did not warrant the issuance of a preliminary injunction to halt construction pending a judicial determination of the issues. *Northcross* v. *Board of Education,* 444 F. 2d 1184 (6th Cir., 1971). In *A Quaker Action Group* v. *Hickel,* 421 F. 2d 1111 (D.C. Cir., 1969), involving government denial of the right to demonstrate in a public park across from the White House, the court modified a preliminary injunction, but specifically declined to reach the issue of whether the mere allegation of infringement of First Amendment rights, without any other injury, constituted "irreparable injury" sufficient to warrant the issuance of a preliminary injunction. 421 F. 2d at 1116.

The court's treatment of an application for summary judgment in *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (S.D.N.Y., 1967) is virtually dispositive of plaintiffs' application in the instant case. There, the court held that while political posters could not be barred

from display on the transit system, but had to be accepted on the same basis as all other advertising, summary judgment would not be granted because of questions of fact relative to the posters' effect on the defendants' obligation to operate the transit system in a manner not to endanger the safety of passengers. Surely, if the simple display of posters on the transit system raises questions concerning the safety of passengers, the active peddling of merchandise, be it newspapers or any other goods, raises the same questions in an even higher degree. Under such circumstances, it would be highly improvident for the court to grant a preliminary injunction without first having the benefit of evidence which could demonstrate the dangers that could arise were such peddling to proceed in the confined and crowded areas of the subway.

Where courts have granted preliminary injunctions when constitutional rights were asserted, the facts and circumstances have no relation to the situation on the instant motion. In *Fortune Society* v. *McGinnis,* 319 F. Supp. 901 (S.D.N.Y. 1970), prisoners confined in a state correctional institution sought to enjoin state officials from preventing them from receiving a certain newsletter " . . . to the same extent they are permitted to receive other publications." The court noted: "To deprive one of his constitutional rights under the First Amendment, his right to read what he will and when he will, is in this Court's view irreparable and immediate injury." 319 F. Supp. at 903. The defendants do not seek to prevent anyone's *receipt* of plaintiffs' newspapers. On the contrary, defendant stands ready to allow all who utilize the subways to receive plaintiffs' newspaper " . . . to the same extent they are permitted to receive other publications," i.e., through the existing system of newsstands where all the publications offered for sale on the transit system may be purchased.

Similarly, in *Albany Welfare Rights Organization* v. *Wyman,* 493 F. 2d 1139 (2nd Cir., 1974), the court enjoined welfare officials from enforcing an *absolute ban* on the distribution of leaflets in a welfare center reception area. Defendants in the present action do not seek to absolutely bar the sale of plaintiffs' newspapers. The papers may be sold from already existing newsstands, which would obviate the potential danger to safety that the unrestricted sale of merchandise in the confined area of the subway could engender.

The court's disposition of plaintiffs' motion for a preliminary injunction in *International Society for Krishna Consciousness* v. *Dallas-Fort Worth Regional Airport Board,* Docket No. CA3-75-0039-F (N.D. Tex., March 21, 1975), is especially illustrative in the context of the instant case. In that case, members of a religious sect sought to enjoin airport officials from prosecuting them criminally for distributing religious literature for monetary contributions. There, the court found that while there was no justification for the coarse conduct of the arresting officers in apprehending the plaintiffs, there was not a sufficient basis to enjoin the defendants from enforcing the ordinance under which the plaintiffs were arrested (slip op. at 5-7). In the case at bar, there is no allegation that the defendants are engaged in bad faith conduct or harassment. It is particularly important to note that the present plaintiffs, as were those in *International Society,* ". . . are charged not with distributing free literature but instead with soliciting a business or trade without a permit, concession or franchise." Slip op. at 11.

A preliminary injunction would not serve the public interest and would have the effect of substantially inter-

fering with the operation of the highly complex transit system which the New York City Transit Authority is charged by statute with maintaining. The Authority has not, and does not, seek to prevent the sale of the plaintiffs' newspapers. It only seeks to regulate those sales through an existing system of newsstands through which all other periodicals are sold on the system.

Plaintiffs concede that valid regulations concerning the sale of material on the New York City subway system are appropriate and necessary. They have fallen far short of sustaining their burden of proof in seeking to demonstrate that the defendants' present method of regulation transgresses the First Amendment. This regulation, combined with the disruption which could occur in the confined area of the system, which four million persons utilize daily, is clearly a sufficient basis to sustain the district court's discretionary denial of a preliminary injunction.

CONCLUSION

The District Court's denial of plaintiffs' motion for a preliminary injunction should be sustained.

June 30, 1975

Respectfully submitted,

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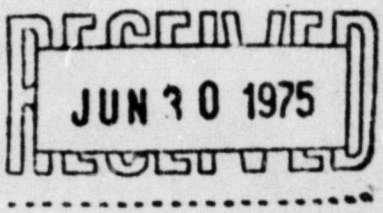

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